

M I L L E R & V A N E A T O N
— P. L. L. C. —

MATTHEW C. AMES
KENNETH A. BRUNETTI*
FREDERICK E. ELLROD III
MARCI L. FRISCHKORN
MITSUKO R. HERRERA*
WILLIAM L. LOWERY
NICHOLAS P. MILLER
HOLLY L. SAURER
JOSEPH VAN EATON

Incorporating the Practice of
Miller & Holbrooke

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4320
TELEPHONE (202) 785-0600
FAX (202) 785-1234

MILLER & VAN EATON, L.L.P.
400 MONTGOMERY STREET
SUITE 501
SAN FRANCISCO, CALIFORNIA 94104-1215
TELEPHONE (415) 477-3650
FAX (415) 477-3652

WWW.MILLERVANEATON.COM

OF COUNSEL:

JAMES R. HOBSON
NANNETTE M. HOULISTON†
GERARD L. LEDERER**
WILLIAM R. MALONE
JOHN F. NOBLE

*Admitted to Practice in
California Only

**Admitted to Practice in
New Jersey Only

†Admitted to Practice in
New Mexico Only

June 27, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: WT 02-377, ex parte communication

Dear Ms. Dortch:

On June 6, 2003, the U.S. Court of Appeals for the D.C. Circuit decided *Cellular Telecommunications & Internet Association and Cellco Partnership, d/b/a Verizon Wireless v. Federal Communications Commission and United States of America*, No. 02-1264, upholding the FCC's refusal to forbear permanently from enforcement of rules requiring wireless carriers to provide local number portability.

NENA, APCO and NASNA submit that the Court's discussion of the meaning of "necessary" in the statutory source of forbearance authority, 47 U.S.C. §160, is helpful to the resolution of the captioned Tier III Coalition petition. The Coalition asks the Commission to forbear from enforcement of the wireless E9-1-1 Phase II caller location accuracy requirements, as applied to Tier III wireless carriers, until an unspecified time after December 31, 2005.

The Court declined to hold that "necessary" means a rule may only be retained if its enforcement "is *absolutely required* or *indispensable*" (emphasis in original) to the protection of consumers. Instead, it said that Congress' intent in using the term in Section 160 was "not plain" on the face of the statute, but must be evaluated in context.

In the forbearance context, for the reasons already stated, it is reasonable to construe "necessary" as referring to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation.

The connection between the permissible goals of saving lives and property through location of emergency callers and the accuracy standards that are means to these ends has only strengthened in the seven years since the Phase II rules were adopted -- as those standards have proven achievable with current technology in many rural areas, by many smaller carriers.

We repeat that the tested mechanism of individual waivers is the preferred means to address those exceptional cases where literal enforcement of the Phase II rules would not serve the public interest.

In our Opposition (at 6-7), we asked "whether there are not clusters of small systems throughout rural America where the costs of adding location-enhancing sites could be shared?"

Subsequently, we discovered that one network solution vendor, Grayson Wireless, had made an ex parte presentation to the FCC on June 8, 2000. Titled "E911 Phase II Readiness Update," the Grayson presentation contained a reference to "Shared Service Bureau Operation for Carrier Cost Reduction." The reference remains accurate. We are further advised, in direct conversation with a representative of TruePosition, that this vendor is also open to selling a location determination system -- workable across all air interfaces -- to be shared by rural or small carriers.

Respectfully submitted,

NENA, APCO and NASNA

By _____

James R. Hobson
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Ave. N.W., Suite 1000
Washington, D.C. 20036 (202) 785-0600
Counsel for NENA and NASNA

Robert M. Gurss
Shook Hardy & Bacon, L.L.P.
600 14th Street N.W., Suite 800
Washington, D.C. 20005 (202) 662-4856
Counsel for APCO